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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 924

MARICOPA BY-PRODUCTS, INC., W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, AND ANAHEIM CITRUS PRODUCTS, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

MARICOPA BY-PRODUCTS, INC., W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, AND ANAHEIM CITRUS PRODUCTS, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the Ninth Circuit denying their petition for mandamus in Cause No. 21802 in that court. Neither the opinion of the Court of Appeals denying the Government's motion to dismiss the appeal and treating the appeal as a petition for mandamus nor the order denying the petition have been reported. The opinion and order of the District Court entered on February 8, 1967, from which the appeal was taken, is attached as Appendix A hereto; the opinion of the Court of Appeals of August 16, 1967, considering the appeal as a petition for mandamus is attached as Appendix B; the order of the Court of Appeals denying the petition is attached as Appendix C.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit from which this petition is taken was entered on October 13, 1967. A petition for rehearing was timely filed; it was denied on November 20, 1967 (Appendix D). This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). The matter in the Court of Appeals was a petition for a writ of mandamus to the United States District Court for the District of Arizona to quash a subpoena duces tecum served upon petitioner Maricopa By-Products, Inc., then known as Maricopa Tallow Works, Inc. The Court of Appeals had jurisdiction under 28 U.S.C. Sec. 1651. The District Court had entered an order denying in part petitioners' motion to quash the subpoena. It had jurisdiction to enter such an order under Federal Rule of Criminal Procedure 12(b).

The issue presented in this case is whether the shareholder-officers of a small and closely held corporation, who are in actual close personal contact with the records called for by the subpoena and with the day-to-day operation of the corporation, may, notwithstanding their personal Fifth Amendment privilege, be compelled to disclose to a Federal grand jury documents of the corporation which may, as a practical matter, incriminate them personally. Related to that issue is the construction of the provisions of the antitrust immunity statutes, 15 U.S.C. Sec. 32-33, and 15 U.S.C. Sec. 24, which provides that a violation by a corporation of any of the penal provisions of the antitrust laws is deemed also that of the officers, directors or agents who have authorized, ordered, or done any prohibited acts.

The District Court and the Court of Appeals interpreted the Fifth Amendment privilege and the statutes involved adversely to the contention of petitioners here. The case deals with no other subject than the interpretation of the Fifth Amendment in this context and of the federal statutes involved. Th order of the Court of Appeals from which this petition is taken was entered on October 13, 1967. Rehearing was denied on November 20, 1967. No opinion was filed by the Court of Appeals on either occasion.

QUESTION PRESENTED

Whether the shareholder-officers of a closely held corporation, who are in actual close personal contact with the matters called for by a grand jury subpoena duces tecum issued in the course of an antitrust investigation and with the day-to-day operation of the corporation, can assert their own personal privilege against self-incrimination as to the production of documents which may, as a practical matter, incriminate them personally.

STATUTES INVOLVED

U. S. Constitution, amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law . . . ."

15 U.S.C. Sec. 24:

"Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual director officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

15. U.SC. Sec. 32-33:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

"Under the immunity provisions in section 32 of this title, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

STATEMENT

On November 21, 1966, the Government caused to be issued to Maricopa Tallow Works, Inc., an Arizona corporation, now known as Maricopa By-Products, Inc. (hereafter referred to as Maricopa) a subpoena duces tecum directing that certain designated records be produced for inspection by a grand jury empaneled by the United States District Court for the District of Arizona in the course of its antitrust investigation of the Arizona hide, dead stock, and tallow industry. The subpoena, attached as Appendix E, demanded production of records relating to ownership of the corporation, the volume and prices of materials bought and sold by the corporation, division or allocation of suppliers of material, stabilization of prices to be paid for materials, as well as records relating to Bootstrap Trading Company, a competitor in the industry, and Emil Kohn, its owner.[1]

Maricopa is an extremely closely held corporation. The small number of officers, shareholders and directors are in close personal contact with the matters called for by the subpoena and with the day-to-day operations of the corporation.[2] Three individuals own

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[1]Documents are defined by the subpoena as originals and copies of all correspondence, memoranda or minutes, bulletins, interoffice communications, recordings of telephone conversations, meetings and conferences, reports, books of account, notes of personal conversations or meetings or telephone conversations owned by or in possession of the addressee relating to the persons responsible for the pricing policy of the corporation, how prices are established, all cost studies and work sheets relating to prices charged, and all documents pertaining to the division and allocation of markets and stabilization of prices, together with desk diaries, appointment books, expense accounts, and memoranda of conversations with representatives of any other rendering company. The numerous documents called for by the subpoena indicate that the Government seeks by this means to establish the extent of participation in the corporation's pricing and marketing decisions by all individuals connected with it.

[2]The affidavit of Thomas E. Lewis submitted to the District Court shows that only two persons conduct the day-by-day administration of the corporation, that there are only three officers and three individual shareholders, together with another corporation owning less than 25% of Maricopa's stock, and that there are only four directors of the corporation (R. 11-12).

the great majority of shares; two of them operate the corporation on a day-to-day basis. This small group of directors and officers has been for all practical purposes the working staff of the concern throughout the period to which the subpoena is directed, 1960 to date.

1. *Proceedings in the District Court.*

On December 2, 1966, Maricopa moved to quash the subpoena duces tecum on the basis of its privilege against self-incrimination (R. 4). At the same time, the six present and former shareholders, officers, and directors of Maricopa sought leave to intervene on behalf of the corporation with respect to the motion to quash and also moved to quash the subpoena directed to the corporation because the subpoena violated the grant of immunity contained in 15 U.S.C. Sec. 32-33 as to them individually and on the further ground that the subpoena violated their individual privilege against self-incrimination. The District Court granted the motion of the shareholders, officers, and directors to intervene (R. 35). The Government has not sought review of this order. The motion of the movant and intervenors to quash the subpoena was then granted insofar as the subpoena required the production of personal papers. The scope of materials required to be produced was limited by the court to the corporate records of the corporation. The court then further ordered:

> "With respect to the materials furnished to the Grand Jury by reason of the subpoena heretofore issued, it is ordered that these materials may only be used for purposes of investigating possible criminal activity on the part of Maricopa Tallow Works, Inc. and may not be used for the purpose of investigating any possible criminal activity on the part of any of the above named individuals." (Appendix F)

On the Government's motion for rehearing, the District Court struck the quoted paragraph of its order in an order dated February 8, 1967, believing *Wild v. Brewer*, 329 F.2d 924

(9th Cir. 1964) to be controlling (Appendix A).[3] However, because of the substantial questions presented as to the scope of the privilege against self-incrimination in this context and the extent of the immunity afforded petitioners under the antitrust laws, the court stayed its order denying the motion to quash and compliance with the subpoena pending an appeal (R. 138).

2. *Proceedings in the Court of Appeals.*

An appeal was promptly taken from the District Court's order of February 8, 1967. Prior to the setting of the appeal for argument, the Government moved to dismiss the appeal either because the order appealed from was not an appealable order or because the state of the law was so clear with respect to the questions presented that the Court of Appeals should summarily affirm the District Court.

The Court of Appeals denied the Government's motion, holding that although the order appealed from was not technically an appealable order under 28 U.S.C. Sec. 1291, petitioners' argument on its merits "is not wholly without merit and we are presented here with a substantial question which the appellants are entitled to have decided." (Opinion, p. 2, Appendix B). The petition was then argued orally and denied in a brief order giving no reasons for the court's decision. A timely petition for rehearing was also denied, without an opinion. This petition follows.

REASONS FOR GRANTING THE WRIT

The Order Entered by the Court of Appeals Denying the Petition for Mandamus is Based Upon Wilson v. United States and Grant v. United States. These Decisions Have Been Implicitly Overruled by Later Decisions of this Court and Should

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[3]Petitioners argued in the District Court both at the time of the hearing on the motion and on the Government's motion for modification that *Wild v. Brewer* was not controlling because that case did not consider the propriety of an order directing that the corporate records be produced but that their use be limited to investigations directed toward persons other than intervenors. (Hearing on motion to quash, T. 8-9, 16-21. Hearing on motion to modify, T. 17-28). The Government agreed. (Hearing on motion to quash, T. 21-22).

Now be Expressly Overruled; the Court of Appeals Order Should Be Reversed.

The District Court, in denying petitioners' motion to quash the subpoena duces tecum directed at Maricopa, relied upon *Wild v. Brewer,* 329 F. 2d 924 (9th Cir. 1964), which held, over the vigorous dissenting opinion of Judge J. Warren Madden, the Fifth Amendment privilege against self-incrimination not applicable to a corporation owned entirely by one individual so as to prevent compliance with an administrative Internal Revenue subpoena duces tecum. The present case arises in the context of an antitrust investigation, rather than an Internal Revenue investigation; different statutes are involved and *Wild v. Brewer* is distinguishable.[4] In a broader sense, however, the question presented by the petition is whether, since the decision of a number of recent cases by this Court, the decision in *Wild v. Brewer* should stand, on the basis of a strict Fifth Amendment analysis.[5]

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[4]Two antitrust immunity statutes, 15 U.S.C. Sec. 32-33, prevent the prosecution or the subjection to any penalty or forfeiture of a witness on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in a proceeding before the grand jury. 15 U.S.C. Sec. 24 provides that a violation by a corporation of any of the penal provisions of the antitrust laws is deemed also that of the directors, officers, or agents who authorized, ordered, or have done any prohibited acts, and punishes such conduct by fine or imprisonment. 15 U.S.C. Sec. 24 was enacted specifically to permit the conviction of corporate officers simply because they were responsible officers of a corporation found to be in violation of the antitrust laws, regardless of a showing of personal involvement in the conduct in question. *See United States v. Wise,* 370 U.S. 405, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962). There are no corresponding sections in the Internal Revenue Code.

[5]In *Wild v. Brewer, supra,* the panel, consisting of Judges Merrill, Madden, and Koelsch, first held that the privilege could be asserted, Judge Koelsch dissenting, with Judge Madden writing the majority opinion. On rehearing, the decision was reversed; Judge Merrill joined Judge Koelsch. 329 F.2d 924. The original majority opinion was withdrawn and does not appear in *Federal Reporter Second,* although it was to a large extent incorporated in Judge Madden's dissent. The original opinion is published in CCH 1964 Standard Federal Tax Reports ¶ 9348.

On rehearing, the majority decided *Wild v. Brewer* simply by reference to *Wilson v. United States,* 221 U.S. 361, 31 S. Ct. 538, 55 L. Ed. 771

FOOTNOTE CONTINUED ON NEXT PAGE

During the past few years, this Court has decided a number of cases guaranteeing the rights established by the Fourth, Fifth, Sixth, and Fourteenth Amendments in a practical, realistic manner. In these decisions, the Court has overruled arbitrary distinctions based on the status or position of the person involved that had formerly constituted obstacles to the claim of privilege.[6] Within the past seven months three other such cases have been decided by the Court sustaining its view that constitutional guarantees are to be construed in a realistic manner.[7]

(1911), and *Grant v. United States*, 227 U. S. 74, 33 S. Ct. 190, 57 L. Ed. 423 (1913). Both of these decisions do without question hold that an individual custodian of corporate books may not decline to produce the books because they may incriminate him. The issue presented by this petition is whether these authorities are inconsistent with the later decisions of this Court.

[6]*See, e.g., Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) (the privilege against self-incrimination secured by the Constitution applies to all individuals); *Johnson v. New Jersey*, 384 U.S. 719, 729, 86 S. Ct. 1772, 16 L.Ed.2d 882 (1966) (the prime purpose of the *Escobedo* and *Miranda* rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice); *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 628, 17 L. Ed.2d 574 (1967) ("We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others . . . we can imply no exception"); *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed.2d 562 (1967) (statements obtained when police officers were faced with choice of self-incrimination or job forfeiture are inadmissible as evidence of guilt since this pressure constitutes coercion, preventing the free and rational choice of whether to waive the privilege); *Application of Gault*, 387 U. S. 1, 87 S. Ct. 1428, 1454, 18 L. Ed. 2d 527 (1967) (the Fifth Amendment is "unequivocal and without exception . . . [T]he scope of the privilege is comprehensive"; the availability of the privilege does not turn upon the proceedings in which its protection is invoked, but upon the nature of the statement or question and the exposure it invites).

[7]In *Warden, Maryland Penitentiary v. Hayden*, 387 U. S. 294, 87 S. Ct. 1642, 1651, 18 L.Ed.2d 782 (1967), the Court abolished the distinction between "mere evidence" and "fruits of crime" for purposes of the validity of a seizure following a search without a warrant because "there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband," thus rejecting a prior artificial distinction unworkable in light of the expanding concept of Fourth Amendment protection. This Term,

FOOTNOTE CONTINUED ON NEXT PAGE

In *United States v. White*, 322 U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542 (1948), the Court applied to a labor union, for purposes of determining whether the privilege against self-incrimination was applicable to it, the test of:

> "[W]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."

In his dissenting opinion in *Wild v. Brewer*, Judge Madden believed that the question whether a closely held corporation has the privilege against self-incrimination should be determined with reference to the *White* test. Constitutional protections have been extended to partnerships as long ago as *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). *United States v. Cogan*, 257 F. Supp. 170 (S.D.N.Y. 1966), illustrates the

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in *Beecher v. Alabama*, ____ U.S. ____, 88 S. Ct. 189, 191, ____ L. Ed. 2d ____, (October 23, 1967), the Court held a confession given after a prior confession had been obtained as a result of illegal police activity inadmissible; "the constitutional inquiry into the issue of voluntariness requires more than a 'mere color-matching of cases';" it requires a "realistic appraisal of the circumstances" in which an accused finds himself. *See also Reck v. Pate*, 367 U.S. 433, 442, 81 S. Ct. 1541, 6 L. Ed. 2d 948 (1961).

Most recently, in *United States v. Robel*, 28 U.S.S.Ct.Bull.B. 419 (December 11, 1967), the Court held section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. Sec. 784(a)(1)(D), unconstitutional as an abridgement of the right of association protected by the First Amendment. This statute, which declared unlawful the employment in any defense facility of a person who was a member of a Communist-action organization under a final order to register, made the assertion of the First Amendment right of association costly, limiting an individual's economic opportunities by reason of his status. The Court, in holding the statute unconstitutional, again reaffirmed its consistent holdings that limitation of personal liberty as the result of the assertion of constitutional rights is constitutionally impermissible. *See also Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (right to travel under the Fifth Amendment); *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) (revocation of security clearance and subsequent discharge from employment without opportunity for confrontation and cross-examination is an impairment of "liberty" and "property" under the Fifth Amendment).

White test's application to partnerships. See also *In re Subpoena Duces Tecum*, 81 F. Supp. 418 (N.D. Cal. 1948). Under these decisions, if Maricopa were a partnership the documents sought could not be compulsorily obtained.

The *White* test also should be applied to closely held corporations such as Maricopa; petitioners commend to the Court Judge Madden's views in this connection. *See also Application of Daniels*, 140 F. Supp. 322, 327 (S.D.N.Y. 1956) (the privilege of the Fifth Amendment does not rest upon an individual's absolute title to the documents in question, but upon his legitimate and personal possession).[8]

Implicit in the Court's recent decisions is the principle that whether the particular entity claiming the privilege is a corporation is no longer a useful inquiry, since that question does not determine whether the entity's character is so impersonal that the personal privilege against self-incrimination otherwise available to its participants has been lost. The clear holdings in the Court's recent decisions emphasizing substance over form with respect to constitutional rights have overruled by implication *Wilson v. United States*, 221 U.S. 361, 31 S. Ct. 538, 55 L. Ed. 771 (1911), and *Grant v. United States*, 227 U.S. 74, 33 S. Ct. 190, 57 L. Ed. 423 (1913), upon which the Court of Appeals relied in *Wild v. Brewer*. The Court of Appeals, in treating petitioners' appeal from the District Court's order as a petition for a writ of mandamus, recognized, however, that petitioners' argument "is not wholly without merit and we are presented here

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[8]A few statistics suggest the importance of the issue presented by this petition. The number of corporations filing income tax returns has greatly increased in recent years, 1,400,000 such returns being filed in 1964. In addition, 48,000 fewer partnership returns were filed in 1964 than in 1957. See *Statistics of Income, Business Tax Returns* (U. S. Government Printing Office, 1967). While an exact number is not possible to determine, certainly a large percentage of these newly formed corporations are closely held business ventures of a family or group of business associates. Failure to apply a meaningful, substantive test in determining the availability of the privilege against self-incrimination deprives all individuals who incorporate their small businesses, whether to achieve a liability shelter or for other similar reasons, of any meaningful Fifth Amendment protection with respect to their business records.

with a substantial question which the appellants are entitled to have decided." (Opinion, p. 2).

The direct effect upon the individual officer, shareholder, and director petitioners should Maricopa's corporate records be required to be produced cannot be overemphasized. Should such production be required, they would not obtain personal immunity under 15 U.S.C. Sec. 32 and 33, since these statutes provide immunity only for testimony obtained pursuant to subpoena. And, under 15 U.S.C. Sec. 24, should the corporate records lead to the conviction of the corporation, conviction of the officers, shareholders, and directors would be possible simply upon a showing of the corporation's guilt and their position as responsible officers within it. Thus, the officers, shareholders, and directors face the possibility of criminal prosecution in the strict sense should the corporate records be required to be produced. The Government has admitted that its purpose in seeking the corporate records is to learn of individual violations of the antitrust laws as a result of its inspection of them. (Hearing, January 23, 1967, T.8; Respondent's answering brief in the Court of Appeals 12; and R. 41).[9]

In addition to the possibility of resulting criminal liability in

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[9]To the extent that the subpoena requires the production of documents and records for the grand jury's inspection that are required to be maintained for Federal or State regulatory purposes, it should be quashed as violative of petitioners' Fifth Amendment privilege. In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 86 S. Ct. 194, 15 L. Ed.2d 165 (1965), the Court held that a person could not be compelled to register as a member of the Communist party where registration would impair his privilege against self-incrimination. Three cases before the Court this Term that have been submitted and are awaiting decision, *Marchetti v. United States*, *Grosso v. United States*, and *Haynes v. United States*, also raise the question whether an individual may be prosecuted for failing to take action under a statute that would impair his privilege against self-incrimination with respect to another offense. Records and documents that the corporation is required to maintain in order to comply with Federal or State law should not be available so as possibly to incriminate its officers, shareholders, and directors. *See also Russell v. United States*, 306 F.2d 402 (9th Cir. 1962) (statute requiring registration of firearms illegally possessed is an unlawful invasion of the Fifth Amendment privilege).

a strict sense should the documents subpoenaed be required to be produced, the corporate officers, shareholders, and directors could also suffer in a manner that would make the assertion of their privilege costly even should only their corporation be convicted as the result of the production of the documents that are sought. This result would follow from (1) the financial loss to the corporation, and therefore to the officers, shareholders, and directors individually by reason of the criminal fine that would be imposed upon conviction, (2) the prospect of civil treble damage liability to the corporation and to its officers, shareholders, and directors, in addition to any criminal fine, (3) the resulting reductions in salaries and dividends able to be paid from a lessened amount of profit, and (4) the personal stigma attached to the officers, shareholders, and directors, as a result of the conviction of the corporation because of their close connection with it and their equal guilt in the public mind. Under *Spevack v. Klein,* 385 U.S. 511, 875 Ct. 625, 17 L.Ed.2d 574 (1967), *Garrity v. New Jersey,* 385 U.S. 493, 875 Ct. 616, 17 L.Ed.2d 562 (1967), *Slochower v. Board of Higher Education,* 350 U.S. 551, 76 S. Ct. 637, 100 L.Ed 692 (1956), *Application of Gault,* 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967), and the other cases previously discussed it is no longer necessary that there exist a possibility of criminal conviction in the narrow sense before the privilege against self-incrimination applies. Taken together, these decisions hold that the assertion of the privilege cannot be made costly; it cannot be made available to some individuals and not to others. The fortuity of possessing a particular status cannot serve to deny the protection of the privilege, as to which no exceptions have been made in the Fifth Amendment and none can be implied. Most importantly, what is required in every case is a realistic appraisal of the circumstances in which an individual finds himself to determine whether the privilege should be available to him.

CONCLUSION

The early decisions of the Court in *Wilson* and *Grant* applying a rigid, arbitrary, test to define the scope of the Fifth Amendment privilege as to corporate officers have been implicitly overruled by the large number of recently decided cases that have expanded the scope of the privilege in other fields. Thus, *Wild v. Brewer*, to the extent that its holding is based upon those two cases, should no longer stand, and those decisions themselves should be expressly overruled. For these reasons, therefore, the petition for the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MARICOPA TALLOW WORKS, INC., movant, and W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, and ANAHEIM CITRUS PRODUCTS CO., INC., proposed intervenors, vs. UNITED STATES OF AMERICA, Respondent.	No. Misc. 177 AMENDED ORDER

On December 6, 1966, upon motion to quash subpoena and motion to intervene, order of this Court was entered granting the motion to intervene and granting the motion to quash in part and further restricting the use of evidence produced in response to the subpoena. Thereafter respondent, United States of America submitted a motion for modification of the order of December 6, 1966, with a memorandum in support thereof. Intervenors responded thereto, and Messrs. Shimmel, Hill, Kleindienst and Bishop moved to appear as *amicus curiae*. Leave to appear as amicus curiae was granted; the matter was argued to the Court; supplemental memoranda were submitted; and the Court took the matter under advisement.

Upon the present state of the law in this circuit it appears that the case of *Wild v. Brewer*, 329 F.2d 924, is controling, certainly, at least until the Court of Appeals for the Ninth Circuit again reviews the problems raised in *Wild v. Brewer*, or comparable problems.

The Court being fully advised in the premises grants the motion to modify its order of December 6, 1966, by the deletion of paragraph 3 of said order, and as amended, said order shall read as follows:

The motion of Maricopa Tallow Works, Inc., to quash subpoena and the motion of W. J. Gieszl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer and Anaheim Citrus Pruducts Co., Inc., to intervene having been presented to the Court this day, the above parties represented by Lewis Roca Scoville Beauchamp & Linton, by John J. Flynn and Paul G. Ulrich, and the respondent represented by Joel B. Rosenstein, attorney, Department of Justice, the Court having heard oral argument thereon, and good cause appearing therefor,

IT IS ORDERED that:

1. The motion of W. J. Giezl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer and Anaheim Citrus Products Co., Inc. to intervene is granted.

2. The motion to quash the subpoena is granted insofar as the subpoena requires the production of the personal papers, records, and documents of the above named individuals, or papers, records, and documents held by them in a personal capacity. The scope of the materials required to be produced under the subpoena is limited to the corporate records of Maricopa Tallow Works, Inc.

DATED this 8th day of February, 1967.

S/ Walter E. Craig
Walter E. Craig, Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Maricopa Tallow Works, Inc., Movant, and W. J. Gieszl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer, and Anaheim Citrus Producers Co., Inc., *Appellants*, vs. United States of America, *Appellee.*	No. 21,802 ORDER

[August 16, 1967]

On Motion to Dismiss

Before POPE, KOELSCH and BROWNING, Circuit Judges.

The United States has moved to dismiss the appeal herein on the ground that the order appealed from is not a final judgment under Title 28 USC §1291. The appellants resist that motion for the reasons adopted and stated by this court in Continental Oil Co. v. United States, 330 F. 2d 347.

The appeal here is from an order denying a motion to quash a grand jury subpoena *duces tecum*. The order denying the motion to quash made it plain that the materials to be produced under the subpoena were limited to corporate records of Maricopa Tallow Works, Inc. During the pendency of the motion W. J. Gieszl and five others were permitted to intervene in support of the motion to quash which was made on behalf of Maricopa Tallow Works, Inc. It appears that the last named corporation was a closely held corporation of which the interveners were the principal officers and stockholders. The order requiring production of

the corporate records was based upon the authority of the decision of this court in Wild v. Brewer, 329 F.2d 924, which held that the privilege of the Fifth Amendment relating to self-incrimination was not available to a corporation in respect to its records and papers.

The contention of the appellant in its attempted appeal is that the rule of Wild v. Brewer, just mentioned, should not be applied here since because this is a very closely held corporation, the production of its papers would tend to incriminate the intervening individuals who are in effect its sole stockholders. Wild v. Brewer supra, rejected such an argument, but the would-be appellants' contention here is that in view of the Supreme Court's present tendency to extend and enlarge the privilege against self-incrimination, it is now time to reverse Wild v. Brewer and similar cases.

In Wild v. Brewer this court came near reaching the result argued for by the appellants here. That was a case of a sole stockholder. A majority of the panel in this court first held that the record sought relating to tax liability of the corporation need not be produced since the production of such evidence might tend to incriminate the sole stockholder. The opinion was by Judge Madden, concurred in by Judge Merrill with dissent by Judge Koelsch. Subsequently, Judge Merrill changed his views and the final opinion was written by Judge Merrill with Judge Koelsch concurring and Judge Madden dissenting.

On this motion the would-be appellants call our attention to the present tendency to enlarge and liberalize the privilege against self-incrimination. Examples of this are said to be Spevack v. Klein, 385 U.S. 511 and Garrity v. New Jersey, 385 U.S. 493. It is suggested that if we hear argument on this point we might decide that as a practical matter allowing this subpoena to stand will bring about self-incrimination of the interveners.

It appears to us that such an argument is not wholly without merit and that we are presented here with a substantial question which the appellants are entitled to have decided. Of course the

order appealed from is not a final judgment, but there is substantial authority in support of the statement of Moore's Federal Practice, Vol. 6, p. 93, "If the order is non-appealable and the party nevertheless takes an improvident appeal, there is authority to the effect that the improvident appeal may be treated as a petition for an appropriate writ." In substance this is what the court did in Continental Oil Co. v. United States, supra, and see Shapiro v. Bonanza Hotel Co., 9 Cir., 185 F. 2d 777, 779, and Steccone v. Morse-Starrett Products Co., 9 cir., 191 F. 2d 197, 200. We think it to be in the interest of justice in this case to treat the attempted appeal as a petition for a writ of mandamus. Accordingly the motion to dismiss the appeal is denied and the United States is directed to respond in the manner in which it would be required to do were the appeal papers denominated a petition for mandamus.

APPENDIX C

FILED
Oct. 13, 1967
Wm. B. Luck, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARICOPA TALLOW WORKS, INC., Movant, and W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, and ANAHEIM CITRUS PRODUCERS CO., INC., Appellants, vs. UNITED STATES OF AMERICA, Appellee.	No. 21802

ORDER

Before: POPE, KOELSCH and BROWNING, Circuit Judges

This court heretofore denied the motion of the United States to dismiss the appellants' attempted appeal herein from an order of the District Court refusing to quash a grand jury subpoena duces tecum, but directed that the proceeding be treated as one for a writ of mandate and that the United States respond.

The matter coming on this day regularly to be heard, all parties appearing by counsel, and being duly submitted,

IT IS ORDERED that the petition for writ of mandate be and the same is denied.

Dated this 12th day of October, 1967.

S/ Walter L. Pope
S/ M. Oliver Koelsch
S/ James R. Browning
Circuit Judges

APPENDIX D

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco 1, Calif.

Nov. 20, 1967

Messrs. Lewis, Roca, Scoville, Beauchamp & Linton
Attorneys at Law
114 West Adams St.
Phoenix, Arizona 85003

Dear Sir:

The Petition for a Rehearing ..... heretofore filed in case No. 21802 — MARICOPA TALLOW WORKS, INC. v. USA was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a mandate of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition, Civil cases: 90 days, Criminal cases: 30 days.

Sincerely,

Wm. B. LUCK, CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
For The
DISTRICT OF ARIZONA

Subpoena to Testify Before Grand Jury

To Maricopa Tallow Works, Inc. South 48th Street, Phoenix, Arizona.

You are hereby commanded to appear in the United States District Court for the District of Arizona at Room 8421, Federal Building, 230 North 1st Avenue, in the city of Phoenix on the 7th day of December, 1966 at 1:30 o'clock P.M., to testify before the Grand Jury and bring with you[1] all those documents, papers, and records described in the attached Annex.

This subpoena is issued on application of the United States of America.

Wm. H. Loveless, Clerk
Date, November 21, 1966. By Jenna Libby, Deputy Clerk

Please report to the office of the United States Attorney, Room 5000 Federal Building, 230 North 1st Avenue, Phoenix, Arizona, on December 7, 1966, at 1:10 p.m. so that your attendance may be recorded.

Note: If you need further information concerning this subpoena, please contact Richard P. Howard, Attorney, Antitrust Division, United States Department of Justice, 836 United States Court House, Los Angeles, California (Telephone: Area Code 213-688-2505).

ANNEX TO SUBPOENA DUCES TECUM DIRECTED TO: MARICOPA TALLOW WORKS, INC.

As used in this Annex, the following terms have the meaning indicated:

(a) "Addressee" refers to the addressee of this subpoena and calls for the documents of said addressee whether at its home office

or in the possession of its divisions, branch offices, officers, agents and employees;

(b) "Person" refers to any individual, partnership, corporation or other legal entity;

(c) "Document" refers to originals and copies of all correspondence, memoranda, minutes, bulletins, interoffice communications, recordings of telephone conversations, meetings or conferences, reports, books of account, notes of personal conversations or meetings or telephone conversations, owned by or in the possession of the addressee;

(d) "Said period" refers to the period from January 1, 1960 to the date of the service of this subpoena unless otherwise indicated;

(e) "Business year" refers to calendar year except in those instances where the addressee keeps its records on a fiscal year basis, in which case it refers to fiscal year;

(f) "Raw materials" refers to fat, bones, grease, offal and other animal waste materials exclusive of animal hides;

(g) "Finished products" refers to tallow, yellow grease, feed fat, meal and other products rendered from the raw materials, and does not include pet food or processed animal hides.

DESCRIPTION OF DOCUMENTS TO BE PRODUCED

1. Such documents as will show, or in lieu thereof at the option of the addressee, a schedule showing the following:

(a) The precise business name and address of each of the following persons and if the person is a corporation, the State and date of its incorporation;

(i) the addressee;

(ii) each subsidiary of the addressee during said period; and

(iii) any corporation owning shares of the addressee to the extent such information is in the possession of the addressee;

(b) The names of the five present largest shareholders or co-owners of addressee, with the nature and extent of the ownership held by each throughout said period;

(c) For each of the last three complete business years before service of this subpoena:

(i) addressee's total purchases of raw materials in the State of Arizona;

(ii) addressee's total sales of finished products

(a) rendered in Arizona and sold in Arizona; and

(b) rendered in Arizona and sold outside Arizona;

(iii) Addressee's total sales of pet food produced in Arizona;

(iv) what portion of the raw materials referred to in (i) above were used in producing the pet foods referred to in (iii);

(v) addressee's total purchases in Arizona of animal hides; and

(vi) addressee's total sales of finished products produced from animal hides purchased in Arizona;

(d) The name, addresses, titles, positions and periods of service at any time during said period of the persons described immediately below with respect to the addressee and each company identified in 1(a)(ii) and 1(a)(iii), respectively:

(i) officers;

(ii) directors;

(iii) each officer, managerial and supervisory employee concerned with establishing the prices paid by addressee for raw materials purchased in the State of Arizona;

(iv) each officer, managerial and supervisory employee concerned with establishing the price for the sale of finished products processed in the State of Arizona;

(e) The names and addresses for each business year during said period of addressee's ten largest suppliers of raw materials;

(f) The names and addresses for each business year during said period of the addressee's ten largest customers for finished products.

2. A complete set of all price lists, work sheets, documents, and formulas for computing prices, including purchase invoices, where the price is printed on the form, work sheets, and orders for printing prices used by addressee in the purchase of raw ma-

terials during said period. (This paragraph is not intended to call for individual invoices or purchase orders where the price paid is worked out on an individual basis, but is intended to call for those documents showing generally how the prices are established.)

3. All documents, including price lists, formulas for computing prices, salesmen's reports, correspondence and memoranda relating to prices for raw materials paid by any competitor of the addressee.

4. Insofar as not called for elsewhere in the subpoena, all cost studies and work sheets relating to the costs of addressee as used in determining the prices charged by addressee for finished products.

5. All documents during said period relating to the income to be realized by addressee from sale of finished products and from sale of hides and from sale of pet food during said period used as a basis for determining the amount to be paid or which could be paid for materials (including raw materials) for the rendering of finished products and for the production of pet food and hides.

(This paragraph is intended to reach the prices received by addressee for its finished products, pet food and hides and studies made, if any, with relation to said income costs, but is not intended to call for all of the sheets of paper pertaining to individual sales of products by the addressee.)

6. Insofar as not called for by other sections of the subpoena, all documents during said period pertaining to the following:

(a) Division or allocation of suppliers of materials, including raw materials, hides, and material for pet food, in Arizona by the addressee and other purchasers;

(b) Stabilization of prices to be paid for raw materials in Arizona;

(c) Bootstrap Trading Company of Phoenix, Arizona;

(d) Emil Kohn.

7. All documents constituting in part or in whole, or referring

to, or relating to, or incidental to each of the following-listed categories:

(a) Any complaints, during said period, directed to the addressee or any other renderer relative to the prices said addressee or other renderer was paying, had paid, or was going to pay for any type of rendering industry raw material, exclusive of any such complaints being made by a supplier of rendering industry raw materials;

(b) Any comparison made, during said period, between the prices paid by addressee for its rendering industry raw materials and the sales prices the addressee had obtained, was obtaining, or expected to obtain, for its rendering industry finished products;

(c) Any intercommunications, during said period, including but not limited to oral discussions, written, telephonic, or telegraphic communications, between Emil Kohn, currently President of Bootstrap Trading Co., Inc. of Phoenix, Arizona, and any owner, director, officer, employee, or agent of the addressee or of any parent or subsidiary business entity of the addressee, or between Emil Kohn and any third-party holding himself out to speak in behalf of the addressee or any principals thereof or on behalf of any parent of subsidiary business entity of the addressee or principals thereof, relative to the Arizona rendering industry or any aspect thereof.

8. Insofar as not called for elsewhere in this subpoena, all documents, including, but not limited to, desk diaries, appointment books, expense accounts and memoranda of conversations, prepared by or for any of the individuals listed in the response to paragraph 1(d), above, pertaining to any meetings, during said period, with representatives of any other Arizona renderer, or its parent or subsidiary business entity.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MARICOPA TALLOW WORKS, INC., movant, and W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, and ANAHEIM CITRUS PRODUCTS CO., INC., proposed intervenors, vs. UNITED STATES OF AMERICA, Respondent.	No. Misc. 177 ORDER

The motion of Maricopa Tallow Works, Inc., to quash subpoena and the motion of W. J. Gieszl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer and Anaheim Citrus Products Co., Inc., to intervene having been presented to the Court this day, the above parties represented by Lewis Roca Scoville Beauchamp & Linton, by John J. Flynn and Paul G. Ulrich, and the respondent represented by Joel B. Rosenstein, attorney, Department of Justice, the Court having heard oral argument thereon, and good cause appearing therefor,

IT IS ORDERED that:

1. The motion of W. J. Gieszl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer and Anaheim Citrus Products Co., Inc., to intervene is granted.

2. The motion to quash the subpoena is granted insofar as the subpoena requires the production of the personal papers, records, and documents of the above named individuals or papers, records, and documents held by them in a personal capacity. The scope of the materials required to be produced under this subpoena is limited to the corporate records of Maricopa Tallow Works, Inc.

3. With respect to the materials furnished to the Grand Jury by reason of the subpoena heretofore issued, it is ordered that these materials may only be used for purposes of investigating possible criminal activity on the part of Maricopa Tallow Works, Inc. and may not be used for the purpose of investigating any possible criminal activity on the part of any of the above named individuals.

DONE IN OPEN COURT this 6th day of December, 1966.

s/ Walter E. Craig
Walter E. Craig, Judge

APPROVED AS TO FORM:
UNITED STATES OF AMERICA, respondent,

By.....
Joel B. Rosenstein,
Attorney, Department of Justice